No. 86-623

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

REX JOSEPH SCHAAFSMA,

Petitioner,

-against-

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the initial stop of petitioner was an unreasonable seizure of petitioner's person violative of the Fourth and Fourteenth Amendments which tainted a subsequent consent "hand check" of petitioner's luggage.

2. Did the state police violate the Fourth and Fourteenth Amendments when they improperly exceeded the scope of the purported "consent" to do a "brief hand check" of petitioner's luggage by opening the sealed containers within petitioner's luggage?

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APPENDIX

Appendix A—Decision of the District Court of Appeal of the State of Florida, Fourth District 1a

No.

In The

Supreme Court of the United States

October Term, 1986

REX JOSEPH SCHAAFSMA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA FOR THE FOURTH DISTRICT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:.

Petitioner Rex Joseph Schaafama respectfully prays that a writ of certiorari issue to review a judgment of the District Court of Appeal of the State of Florida for the Fourth District, which

affirmed a judgment of conviction of the Circuit Court of the 17th Judicial Circuit for the State of Florida.

OPINIONS BELOW

The opinion of the Court of Appeal is not officially reported.

JURISDICTION

The judgment of the District Court of Appeal was entered on July 14, 1986; a petition for rehearing was denied on July 25, 1986. A copy of the judgment is annexed as Appendix A. The Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1257.

STATEMENT OF THE CASE

A. Procedural History

On April 12, 1984, petitioner Schaafsma was arrested for Trafficking in Cocaine contrary to Florida Statutes, Sections 893.135(1)(b)(3), 893.03(2)(a)4, and 893.13(1)(a)(1).

On April 26, 1984, the state filed its Information charging petitioner with the same offense. On November 26, 1984, petitioner filed his Motion to Suppress (R570-572).[1]

On November 30, 1984, petitioner argued his Motion to Allow Polygraph (R1-37). On April 16, 1985, petitioner filed his Supplement to Motion to Suppress (R574-579). On April 16, 1985, hearing was held on petitioner's Motion to Suppress (R50-229).

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1. "R" followed by a number designates the page of the Record on Appeal in the Fourth District Court of Appeal.

Said Motion to Suppress was denied (R551). On April 17 and 18, 1985, jury trial was held (R230-569), at which petitioner was found guilty of the offense charged.

B. Statement of Facts

On April 12, 1984, at approximately 9:00 A.M., petitioner (or, "Schaafsma") arrived by taxi cab at the Amtrak Station in Fort Lauderdale, Broward County, Florida. (R117, 145-147). Narcotics Agent Steven Gaffney observed petitioner approach the ticket counter and observed the petitioner "looking around the area" as Schaafsma purchased the ticket (R64). Detective Gaffney overheard the petitioner "purchase a ticket to the New York area in the name of Jackson, J. Jackson".

Narcotics Detective Carol Knapik on duty with Detective Gaffney when asked at hearing on the Motion to Suppress what drew her attention to petitioner replied: "Basically, I watch all of the arrivals and especially cabs and so forth, public transportation type things." Detective Gaffney offered no testimony of any articulable suspicion that Schaafsma had committed, or was about to commit a crime, merely that Detective Gaffney was "watching" petitioner "as he arrived" (R63).

Petitioner at the hearing on the Motion to Suppress stated that he arrived by cab at the train station and immediately hailed a "red cap" who took his luggage to the train station platform, while petitioner went inside to purchase his ticket without his luggage (R145-147). The detectives advised that petitioner entered the train station ticket office with his luggage, an Airways luggage suitcase and a tote bag (R63, 118-119, 121).

Detective Gaffney at the hearing on the Motion to Suppress testified that he observed petitioner after his ticket purchase walk outside onto the train platform with luggage on a red cap pushcart

(R64, 88-90). Detectives Gaffney and Knapik testified at the hearing on the Motion to Suppress that they thereafter approached petitioner on the train platform, identified themselves as narcotics detectives, produced their badges and cards, asked petitioner as petitioner stood on the train platform, "if he was traveling today", asked him if the bags on the pushcart were his and asked petitioner for identification and petitioner's ticket (R122-123).

The narcotics detectives stood "close to" Schaafsma "within two feet, two or three feet" as they made their inquiries (R65, 90) They observed petitioner upon such questioning to be "very nervous" as Schaafsma advised that "the ticket was in the wrong name" (R65-66). The detectives testified that they advised petitioner of their "duty to make contact with traveling public and solicit their cooperation in DOING A HAND CHECK of their baggage." (R124). The detectives testified that they thereupon returned the ticket and identification and asked for Schaafsma's consent to do a "hand check" of petitioner's luggage and advised that he could refuse (R68, 124). The detectives testified at the hearing on the Motion to Suppress that Schaafsma in response to the the request for consent to "do a hand check" stated "go ahead and look. It's not locked."

Petitioner advised that after he purchased the ticket inside the train station, he went to a telephone booth (R148). The luggage at that time was about forty (40) feet away "on a cart, the cart that the red cap takes." (R149). The narcotics detectives interrupted Schaafsma at the phone booth, identified themselves, and asked him if he had baggage (R149). Upon his acknowledgment that petitioner did have baggage, Detective Gaffney asked to "see them" and requested Schaafsma to "go get them" (R149-150). Petitioner testified that he "went out and got the cart and then came back to the platform underneath the roof" with the luggage and Gaffney "proceeded to just go into the luggage." (R149-150). Schaafsma testified that he was

"frightened", and that as Detective Knapik displayed her badge, petitioner observed the detective's service revolver (R155).

The detectives in "requesting" Schaafsma's "cooperation to conduct a consent HAND CHECK of his carry-on baggage or luggage" (R67), did not "ever ask him" if they "could look inside" the luggage (R92).

The detectives acknowledged that in requesting petitioner's "cooperation" to conduct a brief "HAND CHECK' of his luggage that they did *not* ask if they "could look at the containers inside" the luggage and open same (R93).

Detective Knapik admitted at hearing on the Motion to Suppress that the statement "go ahead, look, it's not locked" was not contained in her probable cause affidavit completed on April 12th, the date of arrest (R97).

Detective Gaffney stated that petitioner "bent over to the ground and laid the suitcase down on its side and unlocked it." (R68). Detective Knapik testified contrary to the above that upon obtaining Schaafsma's "cooperation" to make a "hand check" that:

> "Detective Gaffney proceeded to open the suitcase and look, and he found cocaine in plastic tubs."

Detective Gaffney noted upon examination of the suitcase contents: "It was full. There was clothes, three tupperware containers inside and frying pans, a couple of frying pans and a box." (R69). Detective Gaffney testified "I found *three tupperware containers inside taped shut* containing approximately two (2) kilograms of cocaine." Detective Gaffney admitted that petitioner did *not* consent to search of the sealed tupperware tubs (R92-93). Detective Gaffney upon inquiry by the State, did not

remember "how the plastic containers were situated in the suitcase at the time Gaffney 'opened them' ". (R110). Detective Gaffney did not remember whether there was anything covering or concealing the tupperware tubs when he opened the suitcase (R110).

Schaafsma testified that Detective Gaffney did not make any statements, nor request permission to search petitioner's luggage as Gaffney began to open the suitcase and search its contents (R150-151).

Petitioner testified that the suitcase was a new suitcase recently purchased (R152). A man named Senick, after being certified as an expert witness, testified that the suitcase from examination of the "bottom studs", and other characteristics of the case that the suitcase was new and that April 12th was "probably the first time" such was "used". (R197-199).

Schaafsma testified that the subject suitcase was "locked" at the time of Detective Gaffney's unconsented search because "it had contraband in it". (R151). Petitioner testified that he had removed his fingerprints from the tupperware containers (R152) and as to the precautions Schaafsma took to conceal the subject cocaine, that such was "in three plastic containers, then wrapped in clingfree, and then wrapped in masking tape . . . then clingfree." (R153). The containers were additionally wrapped with masking tape "all the way around". (R153-154). Petitioner testified that the suitcase was locked "so that no one could go in it." (R154).

Schaafsma sought to enter into evidence polygraph results to confirm the truthfulness of petitioner's testimony (R1-37). Petitioner offered to take a stipulated polygraph test to be administered by the State's polygraphist, used by the State customarily for stipulated polygraphs (R20). The trial court at

the hearing on the Motion to Introduce Polygraph, inquired of the State, "Are you agreeable to a stipulated polygraph?" (R22). The court further inquired of the State as to a stipulated polygraph, "What about the Defendant's position? It's not the prosecutor's job to prosecute, but to see justice is done, only to seek the truth." (R23). To these inquiries by defense counsel and the trial court, the State responded, "Don't count on that." (R26). The polygraph test results reflecting the truthfulness of petitioner's testimony were not introduced into evidence.

REASONS FOR GRANTING THE WRIT

This petition raises a recurring and important issue not previously resolved by this Court[2], and as to which the highest state appellate courts remain ensnared in conflict: What is the scope of a permissible "consent" search in the absence of specific limitations placed on it by the subject?

The majority of courts appear to take the view that a consent search is limited in scope. *See, e.g., People v. Sanders,* 44 Ill. App. 3d 510, 358 N.E. 2d 375 (1976) ("By acquiescing in request to look into his trunk he did not consent to a probing exploration into a closed container within the trunk.") *State v. Salit,* 613 P. 2d 245 (Alaska 1980) (consent to x-raying of luggage by airline passenger does not allow physical search of that luggage); *Luxenberg v. State,* 384 So. 2d 742 (Fla. 1 DCA 1980) (consent by defendant to officer's request to open a box did *not* allow officer to slit open a black plastic bag within the box); *Moorehead v. State,* 378 So. 2d 123 (Fla. 2 DCA 1980) (subject's consent to look at cue did not extend to officer's act of unscrewing it to find out what was inside); *State v. Cuzick,* 21 Wash. App. 501, 585 P. 2d 485 (1978) (where defendant consented after officer's request to "look into car," officer exceeded scope by searching into suitcase found in car).

The apparent minority view is that if the defendant does not place explicit limitations on the search, it is not limited in scope. *See, e.g., Mosley v. State,* 289 Md. 571, 425 A. 2d 1039 (1981) (where defendant consented to police request to "look at" briefcase, consent covered looking inside); *State v. Austin,* 91 N.M. 793, 581 P. 2d 1288 (1978).

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2. *But cf., Walter v. United States,* 447 U.S. 649 (1980); *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 329 (1979).

It is respectfully submitted that the present petition affords this Court the clear opportunity to articulate standards regarding the scope of consent searches.

I.

THE INITIAL STOP OF PETITIONER WAS AN UNREASONABLE SEIZURE OF HIS PERSON, TAINTING THE LATER "CONSENT" SEARCH OF HIS LUGGAGE.

It is submitted that after the officers' presentment of identification, display of Detective Knapik's firearm, and advice that the officers were narcotics officers who wanted to "hand check" petitioner's bags for narcotics, the "contact" was elevated to a constitutionally significant restraint requiring "articulable suspicion." Because there were no articulable facts upon which reasonable suspicion could have been predicated and because such "contact' significantly restrained petitioner's liberty, such was an illegal and unreasonable seizure, contrary to Schaafsma's rights assured under the Fourth and Fourteenth Amendments to the United States Constitution. The purported "consent" obtained in this coercive setting, after the illegal and unreasonable seizure of Schaafsma, was presumptively tainted by the prior illegal seizure of petitioner. That purported "consent' by virtue of such taint as a matter of law must be presumed to be involuntary and otherwise, not freely given. For such reason, the contents of Schaafsma's suitcase, so obtained in violation of his Fourth and Fourteenth Amendment rights against unreasonable searches and seizures should properly have been suppressed.

In *Horvitz v. State*, 433 So. 2d 545 (Fla. 4 DCA 1983), the court addressed a factual scenario similar to that herein where Horvitz arrived at an airlines terminal and as herein, "apparently, for unexplained reasons, he was immediately under suspicion." Horvitz purchased a "one way ticket" to a northern city, and

"looked" nervous. He was approached by two narcotics agents who "stated that they were looking for narcotics and wanted to look inside Horvitz's briefcase and shoulder bag.' Horvitz opened his briefcase, but asked the officers not to touch several packages wrapped in Christmas paper contained therein. A detective picked one of the packages up, smelled it, and testified that "it smelled like cocaine." *Id.* at 546.

The court found the initial stop and detention to be unlawful. The appellate court reversed, and stated that where there exists no articulable suspicion that a person has committed, or is about to commit a crime:

> "To establish that the stop of Appellant was lawful, it must be shown that the stop was based on a *founded suspicion* that Horvitz was *engaged in criminal activity.*"

The court concluded the purchase of a "one-way ticket" for cash, the "nervous" demeanor of the person contacted, that his luggage consisted of only a purse-sized shoulder bag and an attache case, and that the person so stopped "appeared to notice the police officers" not to present an articulable, factual basis for a founded suspicion that Horvitz was engaged in criminal activity.

The court held at page 546:

> "In view of the cited authorities, *the facts as outlined above are not sufficient to justify the initial stop;* therefore, the action of the police constituted an *illegal seizure.*" (Emphasis supplied.)

As in *Horvitz*, here the officers presented no articulable suspicion that petitioner was engaged in criminal activity such

as would "justify the initial stop". Detective Gaffney failed to offer any testimony that he had a "suspicion" merely that Schaafsma "looked" around when inside the train terminal. Detective Knapik offered only her conclusion after three weeks' work with Detective Gaffney that she made it her practice to pay particular attention to people who arrived in taxi cabs. Such falls far short of even the scant basis offered by the officers in *Horvitz* for their initial intrusion.

As in *Horvitz*, the initial stop of petitioner herein was made without a "reasonable articulable suspicion" that Schaafsma was engaged in criminal activity and was without "probable cause" to arrest petitioner.

Further, such was a "seizure" for purposes of the Fourth Amendment to the United States Constitution. As in *Florida v. Royer*, 460 U.S. 491 (1983), "because" petitioner was "being illegally detained when he consented to search of his luggage" the "consent was tainted by the illegality and was ineffective to justify the search."

In *Royer*, this Court stated:

> "Prior to *Terry v. Ohio, supra*, any restraint on the person amounting to a seizure for purposes of the Fourth Amendment was invalid unless justified by probable cause (citations omitted) *Terry* created a limited exception to this general rule: certain seizures are justifiable under the Fourth Amendment *if there is articulable suspicion that a person has committed or is about to commit a crime.*
>
> * * *
>
> Detentions may be 'investigative' yet violative of the Fourth Amendment absent probable cause."

(Emphasis supplied.) *Id.* at 1324.

The instant investigative detention of petitioner to make a "hand check" of his luggage at the end of the railroad platform, after his taxi cab had departed was a "seizure" for purposes of the Fourth Amendment to the United States Constitution. As in *Royer*, where the one way ticket to New York City was also in another name, where the detectives similarly identified themselves as narcotics detectives in search of narcotics, and where the detainee "became noticeably more nervous during this conversation", so here a "seizure" for purposes of the Fourth Amendment occurred. As Royer "testified that he was under the impression that he was not free to leave the officers' presence" so too the totality of circumstances reflects that the detention of Schaafsma was a "seizure" and that petitioner reasonable felt he was not free to leave.

It is clear that petitioner was "seized" because "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall,* 446 U.S. 544, 554 (1980); *United States v. Sapastein,* 723 P.2d 1221, 1224-1225 (6th Cir. 1983).

As in *Royer,* the "consent" obtained herein was a "mere submission to a claim of lawful authority." The State has failed to meet its "burden of proving that the necessary consent was obtained and that it was freely and voluntarily given."

Moreover, the State clearly bears the burden of proof as to *voluntariness* of a warrantless search that such purported "consent" to "search" was "free and voluntary", *United States v. Mendenhall; Florida v. Royer; United States v. McCaleb,* 552 P. 2d 717 (6th Cir. 1977); *Royer v. State,* 389 So. 2d 1007 (Fla. 3 DCA 1980); *Leonard v. State,* 431 So. 2d 614 (Fla. 4 DCA 1983). Here the State failed to meet its burden.

Similarly, in *State v. Frost,* 374 So. 2d 593 (Fla. 3 DCA 1979), the court held Frost to have been unlawfully seized at an airport before he purportedly consented to search of his luggage. The court found at page 596:

> "Before the discovery of the cannabis in the briefcase, it is conceded by the State that the officers had neither probable cause to arrest Frost nor '*founded suspicion*', that he was involved in criminal activity which is *necessary to make a Terry investigative stop.* There was therefore *no constitutional basis for any restriction of Frost's liberty* at that time. (citations omitted) It is well settled that a '*consent*' given after a constitutionally impermissible restraint is *presumptively tainted* by that restraint and hence invalid." *Id.* at 596.[3]

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3. *See also, Pomerantz v. State,* 372 So. 2d 104 (Fla. 3 DCA 1979); *Taylor v. State.* 355 So. 2d 180 (Fla. 3 DCA 1978); *United States v. Ballard,* 573 F. 2d 913 (5th Cir. 1978); *Martinez v State,* 414 So. 2d 301 (Fla. 4 DCA 1982); *United States v. Gooding,* 695 F. 2d 78 (4th Cir. 1982).

As in *Frost,* there is not a demonstration of any "founded suspicion" that petitioner was engaged in criminal activity at the time the narcotics agents cornered him on the platform waiting for his train he would permit the "investigative stop" that ensued. Hence his detention was a significant restraint upon petitioner's liberty such as to be elevated to a "seizure" of his person, and was constitutionally impermissible, absent founded suspicion, and *presumptively* tainted the *purported* consent given by petitioner for a "hand check" of his luggage.

II.

THE POLICE OFFICERS IMPERMISSIBLY EXCEEDED THE LIMITS OF THE "CONSENT" AND THUS VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS' PROHIBITION AGAINST UNREASONABLE SEIZURES.

The bounds or parameters of the purported "consent" given by Schaafsma for a "brief hand check" of his luggage were exceeded by the detectives when they opened the sealed tupperware containers containing cocaine. There is an absence of evidence that petitioner consented to search of such tupperware containers. Because the search was otherwise without probable cause, without the existence of exigent circumstances and without warrant, it must be deemed unreasonable and violative of petitioner's rights assured under the Fourth and Fourteenth Amendments to the United States Constitution. The denial of petitioner's Motion to Suppress should accordingly have been reversed.

In *Leonard v. State,* 431 So. 2d 614 (Fla. 4 DCA 1983), the appellant consented to a limited search of an automobile for weapons. The officers conducted a "general exploratory search" in which they unzipped a closed pouch found within the vehicle. The court reversed the trial court's denial of appellant's motion to suppress, and announced:

> *"A consent search is reasonable only when kept within the bounds of the consent,* and the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible. *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).
>
> * * *
>
> However, *to support a finding of consent to search without a warrant, the State must present clear*

and convincing evidence. Bailey v. State, 319 So. 2d 22 (Fla. 1976). *Id.* at 613.

The court found the "*evidence does not clearly and convincingly demonstrate that Appellant consented to a continuing, blanket search . . . .*" *Id.*

As in the *Leonard* decision, *supra,* if this Court accepts the testimony of the arresting officers, consent was only given for a brief "hand check". Detective Gaffney admitted that he did not ask petitioner if Gaffney could look inside the suitcase (R92). Detective Gaffney conceded that he did not ask petitioner if he could look at the containers inside the suitcase. Detective Gaffney acknowledged that he did not ask Schaafsma if he could open the sealed containers found inside the suitcase and examine the container contents (R93).

The subject of the search was unreasonable because it exceeded the bounds of a brief "hand check". There is no persuasive evidence that Schaafsma consented to the "general exploratory search" of the suitcase's contents, nor to Detective Gaffney's opening of the sealed tupperware tubs. The contents obtained should accordingly have been suppressed. *See United States v. Dichiarinte,* 445 F. 2d 126 (7th Cir. 1971) (consent to search for narcotics did not allow search and opening of private papers); *United States v. Humphrey,* 456 F. Supp. 51 (E.D. Va. 1975) (consent to inspect items in plain view did not extend consent to opening a sealed envelope).

Similarly, in *Moorehead v. State,* 375 So. 2d 123 (Fla. 2 DCA 1980), a police officer asked if he "might examine" Mr. Moorehead's pool cue. The officer unscrewed the cue and discovered contraband. The court found that "the officer did not ask for, and appellant did not give, his consent to a search of the pool cue." As here *sub judice,* the search exceeded the limited

consent given to the officer, and the denial of Mr. Moorehead's motion to suppress was reversed.

In *State v. Fuksman,* 468 So. 2d 1067 (Fla. 3 DCA 1985), where the court addressed a "consent to search of a vehicle", the court held at page 1096:

> "Absent probable cause, the police can engage in the greater intrusion of search the luggage only under circumstances in which the *scope of the consent to search* is defined clearly enough to include luggage."
> (Emphasis supplied.)

Because the officers herein did not have an articulable suspicion that Schaafsma had committed, or was about to commit a crime, and because the facts known to the officers at the time they obtained their "consent" to a "hand check" did not provide probable cause for arrest, in accordance with *Fuksman, supra,* the search of the tupperware exceeded the scope of "consent" and was *unreasonable.* The cocaine so obtained should accordingly have been suppressed. *Arkansas v. Sanders,* 442 U.S. 753, 761 (1979); *United States v. Chadwick,* 433 U.S. 1 (1977); *Coolidge v. New Hampshire,* 403 U.S. 433 (1971).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
September 23, 1986

Respectfully submitted,

RICHARD B. LIND
Attorney for Petitioner

APPENDIX A — DECISION OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

CASE NO. 85-1206

REX JOSEPH SCHAAFSMA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Decision filed July 9, 1986

Appeal from the Circuit Court for Broward County; Robert W. Tyson, Jr., Judge.

Rhonda L. Rogers, Craig K. Satchell of Robert C. Stone, P.A., Hollywood, for appellant.

Jim Smith, Attorney General, Tallahassee, Joan Fowler Rossin and Michael W. Baker, Assistant Attorneys, General, West Palm Beach, for appellee.

PER CURIAM.

Appendix A

AFFIRMED.

HERSEY, C.J., DOWNEY AND LETTS, JJ., concur.

RECEIVED: July 14, 1986

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.